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Docket No. 96-6
CARP NCBRA

ADJUSTMENT OF THE RATES FOR NONCOMMERCIAL EDUCATIONAL BROADCASTING COMPULSORY LICENSE

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Dated: December 3, 1997

Before The
LIBRARY OF CONGRESS
United States Copyright Office
Copyright Arbitration Royalty Panel
Washington, D.C. 20024

In the Matter Of

ADJUSTMENT OF THE RATES FOR
NONCOMMERCIAL EDUCATIONAL
BROADCASTING COMPULSORY LICENSE

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ASCAP'S REPLY TO PUBLIC BROADCASTERS'
RESPONSE TO ASCAP'S MOTION TO STRIKE
CERTAIN PORTIONS OF THEIR DIRECT CASE

The American Society of Composers, Authors and Publishers ("ASCAP") makes the following reply to the Response (the "Response") of the Public Broadcasting Service ("PBS"), National Public Radio ("NPR") and the stations on whose behalf they appear in this proceeding ("Public Broadcasters") to ASCAP's Motion to Strike Certain Portions of the Direct Case of Public Broadcasters (the "Motion").

I.

ASCAP has moved to strike Dr. Adam B. Jaffe's testimony regarding the ability of the radio and television stations represented by the Public Broadcasters to pay music increased license fees. At pages 10-15 of his direct testimony, Dr. Jaffe repeatedly refers to these stations' "budgets" as the basis for his opinion, making twelve separate references to station "budgets" and their contents in those pages. At page 15 of that testimony, Dr. Jaffe writes:

We have at our disposal the best possible measure of how all those [budgeting] constraints work: the actual program funding budgets. As discussed above, the aggregate of these budgets has grown slightly over the last five years.

As set forth in ASCAP's moving papers, no such "budgets" been produced in response to ASCAP's request for production of documents. Public Broadcasters acknowledge in their Response that Dr. Jaffe in fact never reviewed such individual station budgets or even the budgets for the Corporation for Public Broadcasting ("CPB"), which Public Broadcasters claim is a party to this proceeding. Contrary to his testimony, Dr. Jaffe merely relied on data relating to CPB's expenditures over the last license period. In an effort to rehabilitate his testimony, Public Broadcasters now equate "budgets" (upon which Dr. Jaffe inaccurately stated he relied) with "expenditures" by CPB. (See Response at 2). Far from being "overly literal," as Public Broadcasters claim at page 3 of their Response, ASCAP has every right (as does the CARP) to assume that when Dr. Jaffe purports to rely on "budgets" for his opinion, he means what he writes.

This elision of "budgets" and "expenditures" is significant. In testifying about "budgets," and particularly "budget constraints," Dr. Jaffe implies that Public Broadcasters may be unable to allocate sufficient funds to cover any increase in licensing fees over the next five years. At page 10 of his testimony, Dr. Jaffe opines, "if music royalties rise, there is no mechanism that adjusts the budgets upward to reflect this increased cost."

It now appears from Public Broadcasters' acknowledgment that, in fact, Dr. Jaffe never had any information as to whether or not Public Broadcasters, could "adjust" their "budgets" to account for an increase in fees. Dr. Jaffe instead can only opine about summary

expenditure data which is plainly irrelevant to what Public Broadcasters can pay prospectively for the period 1998 through 2002.

Dr. Jaffe's testimony as to future financial limitations upon the stations represented by the Public Broadcasters (or their "budgets") is not based on any data which would or could support his opinion. Thus, it is without any factual foundation and, like all such unsupported opinion testimony, should be stricken. See Order, dated December 13, 1995, In the Matter of Distribution of 1990, 1991 and 1992 Cable Royalty Funds, Docket No. 94-3 CARP CD 90-92 (motion to strike exhibit for lack of a proper foundation granted).

II.

The absence of factual foundation which taints Dr. Jaffe's testimony as described above also renders unsupportable his testimony as to "music use" by public radio stations (as well as the complementary testimony of Peter Jablow of NPR filed by Public Broadcasters). That testimony seeks to correlate radio station formats and radio station music use. The inadequacy of foundation is the basis for ASCAP's motion to strike such direct testimony by both Dr. Jaffe and Mr. Jablow.

In their Response, Public Broadcasters now concede that the music use "information" on which their witnesses relied is at best minuscule and cannot support their opinions. It now appears that Public Broadcasters' music use "data" is entirely dependent upon Mr. Jablow's assumption that "news" and "classical" formatted stations are the "least likely" to play music from ASCAP's repertory. Apparently, the sole basis for the assumption is Mr. Jablow's observation that "news" stations do not play much music and that "classical" stations play a large volume of music in the public domain. Typical of Dr. Jaffe's testimony is his unsupported surmise that "Given this static programming mix on public radio, it seems

extremely unlikely that there have been any significant changes in the average music intensity of public radio programming.” (Jaffe Statement at 16)(emphasis added).

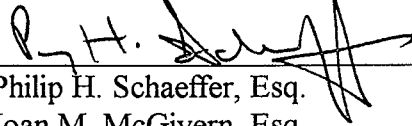
Dr. Jaffe has no rational basis to support his views on what public radio stations’ “music use intensity” was, or is, and neither he nor Mr. Jablow should be permitted to offer uninformed guesses or conjecture as to what that intensity might be. We are before the CARP to determine, among other things, the appropriate license fees for public radio stations which on their own earned nearly \$2.1 billion over the last license term. There may be some appeal to Mr. Jablow’s reductionist assumptions – - after all, “news” stations may appear to play fewer feature performances of music than “jazz” stations. However, to allow sweeping opinions such as Dr. Jaffe’s to be based upon such inadequate surmise is to demean the process of a CARP proceeding.

Conclusion

For the foregoing reasons, ASCAP respectfully requests that its Motion to Strike Certain Portions of the Direct Case of Public Broadcasters be granted.

Dated: December 3, 1997

Respectfully submitted,



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CERTIFICATE OF SERVICE

I am an associate at White & Case. On December 3, 1997, I caused to be served by hand same day delivery true copies of ASCAP's Reply to the Public Broadcasters' Response to ASCAP'S Motion to Strike Certain Portions of Their Direct Case on the following persons:

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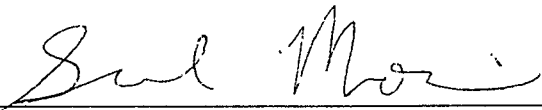
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Dated: New York, New York
December 3, 1997



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